Ong Poh Cheng v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P–05–107 OF 1995
SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA
31 JULY 1998

Evidence *— Identification evidence — Accused, of — Whether rejection of evidence of identification at identification parade was fatal to dock identification of accused as person who committed the crime*

The appellant was found guilty and sentenced by the High Court. At the trial, the learned judge ruled that the identification of the appellant at an identification parade was defective; he however accepted the identification of the appellant in court by the complainants. Counsel for the appellant submitted that the learned judge had erred in accepting the dock identification of the appellant, and therefore, the identity of the appellant as the person who had committed the offences had not been conclusively proved.

Held, dismissing the appeal:

It does not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant. His rejection of the evidence of the identification at the identification parade was in no way fatal to the dock identification of the appellant as the person who had committed the offences. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted (see p 11D–G); *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 distinguished.

[Bahasa Malaysia summary

Perayu didapati bersalah dan dijatuhkan hukuman oleh Mahkamah Tinggi. Di perbicaraan, hakim yang arif telah memutuskan bahawa pengecaman perayu di suatu perbarisan cam adalah defektif; namun demikian beliau menerima pengecaman perayu di mahkamah oleh pengadu-pengadu. Peguam perayu menghujahkan bahawa hakim yang arif terkhilaf dalam menerima pengecaman perayu dari kandang saksi, dan dengan itu, identiti perayu sebagai orang yang telah melakukan kesalahan tidak dibuktikan secara muktamad.

Diputuskan, menolak rayuan:

Ia tidak bermakna, sebagai hal biasa, bahawa hanya kerana hakim yang arif telah menolak pengecaman di perbarisan cam, beliau sebagai suatu keperluan mestilah juga menolak pengecaman perayu dari kandang saksi. Penolakan keterangan ke atas pengecaman di perbarisan cam tidaklah padah dalam apa-apa cara kepada

A pengecaman perayu dari kandang saksi sebagai orang yang telah melakukan kesalahan. Atas fakta dan keadaan kes ini, pengecaman perayu di mahkamah atau dari kandang saksi telah diterima dengan betul (lihat ms 11D–G); *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 dibeza.]

B

Notes

For cases on identification of an accused, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1067–1087.

C

Cases referred to

Arumugam s/o Muthusamy v PP [1998] 3 MLJ 73 (distd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)

D

Legislation referred to

Firearms (Increased Penalties) Act 1971 ss 3, 4
Penal Code (FMS Cap 45) s 308

Appeal from: Criminal Trial No 45–11 of 1993 (High Court, Pulau Pinang)

E

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Shamsul Sulaiman (Attorney General's Chambers) for the respondent.

Shaik Daud JCA (delivering judgment of the court): The appellant Ong Poh Cheng, was originally charged in the High Court at Penang for an F offence under s 3 of the Firearms (Increased Penalties) Act 1971 ('the Act') in that he discharged a firearm with intent to cause death or hurt in the course of a robbery, an offence punishable with death upon conviction. The trial proceeded on that basis but at the close of the prosecution's case, the learned judge found that the prosecution had not succeeded in proving the offence as charged but had succeeded in proving a case under s 4 of the G Act in that he exhibited a firearm in a manner likely to put a person in fear of death or hurt in the course of a robbery. The court accordingly amended the charge and was also of the view that there was evidence to establish that the appellant had discharged the firearm at Constable 89541, Mohd Tahir bin Mohd Shah and Constable 109196, Mohd Yusoff bin Ismail with the intention of causing death or such bodily injury likely to cause H death to the said constables, an offence punishable under s 308 of the Penal Code (FMS Cap 45). In the light of this finding, the learned judge added this charge and called upon the appellant to enter his defence on both the amended and additional charges.

At the close of the defence case, the appellant was found guilty on both I the charges. For the offence under s 4 of the Act, he was sentenced to life imprisonment with six strokes of rotan and for the offence under s 308 of the Penal Code, he was sentenced to imprisonment for three years to take effect from his date of arrest.

Encik Karpal Singh, learned counsel for the appellant, relied on one main ground of appeal, ie on the issue of the identification of the appellant. He submitted that the learned judge after concluding that the identification of the appellant at an identification parade was defective, erred in accepting the identification of the appellant in court as the robber. He argued that since the identification of the appellant at the identification parade was defective, the learned judge rightfully rejected that identification. He further argued that in the light of the evidence led by the prosecution, the identity of the appellant as the robber had not been conclusively proved.

Encik Shamsul Sulaiman, the learned deputy public prosecutor, conceded that the main issue in this appeal was the identity of the appellant as the robber. However, he submitted that the dock identification of the appellant was not the only evidence that connected him to the crime. In order to appreciate his line of argument, it is pertinent to consider the facts of the case.

At about 3 to 3.15pm on 18 August 1997, Liew Yeow Wah ('SP1') the proprietor of Tai Loong Diamond and Jewellery of 90 Pitt Street, Penang testified that he was in the shop and his brother Liew Khim Wan ('SP15') was attending to a customer. He saw the appellant parking his motorcycle outside the shop. SP15 in fact opened the door of the shop for the appellant to enter. On entering, he was attended to by SP1. He asked and was shown certain gold ornaments, which he inspected and even asked for more ornaments to be shown. After sometime, the customers who were being attended to by SP15, left the shop. Immediately thereupon, appellant whipped out a gun and declared that he was holding up the shop. The appellant emptied two trays of ornaments into a plastic bag and started to walk out of the shop. As he could not open the door, he flashed his gun at SP15 and demanded the door to be opened. SP15 did as demanded and the appellant left the shop with the gun still in his hand. As soon as he stepped out of the shop, SP1 and SP15 saw the appellant firing his gun in the direction of the adjoining shops. They heard several rounds of gunfire. It so happened that at the very moment the appellant was about to step out of the shop, two patrolling police personnel, SP9 and SP12, were alerted to the robbery and they saw the appellant in the shop with a gun in his hand. The appellant must have seen the two constables too, for as he stepped out of the complainant's shop, he opened fire in the direction of the two constables. The constables returned fire and took cover behind a large flower pot standing in front of the complainant's shop. A further exchange of fire ensued between the appellant and the constables. The appellant managed to get on his motorcycle and sped off with the constables discharging gunshots in his direction.

The learned judge made a specific finding of fact that SP1 and SP15 had ample opportunity to observe the robber who was barely a foot or so from them. The two constables were equally specific in their identification of the appellant as the robber who shot at them. The learned judge came to the conclusion that the appellant was 'indelibly and positively identified by the complainants SP15, SP9 and SP12 in manner assertive and unfaltering.'

A The learned judge also made a finding of fact that apart from the indelible identification in court, there were other evidence that pointed irresistibly to the appellant as the robber. SP9 in his evidence testified that when he opened fire at the fleeing robber: 'Saya rasa dia kena tembak'. The appellant who was arrested one month later had two healed gunshot wounds, one in the elbow region of the left arm and the other in his right buttocks, with the entry point in each case from the rear. Further, when the appellant was arrested, a gold bracelet recovered from him was positively identified as one of the articles stolen from the shop in question. Several other gold items recovered were also positively identified by SP1.

In the light of the overwhelming evidence, we are satisfied that the learned judge came to the right conclusion as to the identity of the armed robber as being the appellant. We are also satisfied that apart from the court identification of the appellant as being the armed robber, there are other overwhelming evidence which positively put the appellant at the scene of the robbery at Tai Loong Diamond and Jewellery shop on the day in question. It does not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant. He rejected it not because there was no identification of the appellant as the robber, but because there were defects in the conduct of the parade [the appellant was in fact identified]. In the light of this, we find that his rejection of the evidence of the identification at the identification parade was in no way fatal to the dock identification of the appellant as the robber. The learned judge had ample evidence before him to come to the conclusion as he did on the identity of the robber as being the appellant.

Generally speaking, an identification at an identification parade, held usually a short time after the incident, would tend to strengthen the prosecution's case but it does not follow that the lack of it would be fatal, or would destroy a court or dock identification. It must necessarily depend on the facts and circumstances of each particular case. Unlike in the case of *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 where the court relied solely on the dock identification, in the present case there are other cogent evidence to put the appellant at the scene of the robbery. The court's identification was merely to confirm this. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted.

It is rather strange that having strenuously challenged the issue of identification, the appellant in his defence unreservedly admitted to being the robber in question. His defence was that it was not the case of him not being the robber in question, but that he was only armed with a toy or imitation gun. Firstly, it is significant that the issue of an imitation gun was only raised in his defence. During the course of the case for the prosecution, not one hint was apparent that the so-called gun was in fact a toy or imitation gun. It is trite law that it is encumbent for the defence case to be put at the earliest possible stage and not sprung as a surprise for the first time when the defence is putting forward its case (see *PP v Lin Lian Chen* [1992] 2 MLJ 561). The learned judge rejected this defence on the ground

that it has not raised any doubt on the prosecution's case, as the unrebutted evidence showed that the gun in the appellant's hand was in fact a genuine gun.

According to the two constables, the appellant on stepping out of the shop opened fire at them and they in turn retaliated. They even had to take refuge behind a big flower pot. There would have been no reason for the two constables to open fire at the appellant if he did not open fire at them first and no reason for them to take refuge as they did if the appellant had only a toy gun. In the light of the evidence before the court, we are of the view that the learned judge rightly rejected the defence of the imitation gun.

In view of the overwhelming evidence before the court, we found no reason to disturb the findings of the learned judge. We dismissed the appeal and confirmed both the convictions and the sentences.

Appeal dismissed.

Reported by Loo Lai Mee